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APPENDIX A

IN THE DISTRICT COURT
IN AND FOR CRAIG COUNTY
STATE OF OKLAHOMA

Case No. CJ-08-43

Jury Trial Demanded

[Dated July 31, 2008]

WAGONER COUNTY RURAL WATER DISTRICT NO. 2, WAGONER COUNTY RURAL WATER DISTRICT NO. 7, WAGONER COUNTY RURAL WATER DISTRICT NO. 9, CHEROKEE COUNTY RURAL WATER DISTRICT NO. 11, PEGGS WATER COMPANY, and TRI-B NURSERY, INC.	)
Plaintiffs,	)
vs.	)
GRAND RIVER DAM AUTHORITY	)
Defendant.	)

PLAINTIFFS' RESPONSE AND OBJECTION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED PETITION AND BRIEF IN SUPPORT

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PLAINTIFFS' RESPONSE AND OBJECTION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED PETITION AND BRIEF IN SUPPORT

Plaintiffs, Wagoner County Rural Water District No. 2 ("Wagoner 2"), Wagoner County Rural Water District No. 7 ("Wagoner 7"), Wagoner County Rural Water District No .9 ("Wagoner 9"), Cherokee County Rural Water District No. 11 ("Cherokee 11"), Peggs Water Company ("Peggs"), and Tri-B Nursery, Inc. ("Tri-B"), hereby submit their response and objection to the Motion to Dismiss filed by the Defendant, Grand River Dam Authority ("GRDA"). For the reasons that follow, GRDA's Motion should be denied.

I. INTRODUCTION

GRDA was created by the Oklahoma Legislature in 1935 pursuant to 82 O.S. § 861, *et seq.* which conferred on GRDA the right "[t]o control, store and preserve, within the boundaries of the District, the water of the Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District" and "to develop and generate water power and electric energy within the boundaries of the District." (82 O.S. § 862).

After its creation, GRDA surveyed the Grand River and adopted a plan for the creation of three dams along the Grand River at Pensacola, Markham Ferry and Fort Gibson. *Grand River Dam Authority v. U.S.*, 175 F.Supp. 153, 155 (CT.CL. 1959). By 1940, GRDA had constructed the Pensacola dam and had acquired lands, easements and rights of way and had constructed transmission lines, substations and other

facilities for the connection of the Pensacola project with the dams contemplated at Markham Ferry and Fort Gibson. *Id.* However, before GRDA could build the Fort Gibson Dam, Congress passed the Flood Control Act of 1941 which authorized the construction of three dams along the Grand River by the United States. *Id.* The United States undertook the construction of the Fort Gibson dam on its own and completed its construction in 1950. *Id.*

GRDA owns and operates the Pensacola Dam on Grand Lake and the Markham Ferry Dam on Lake Hudson. The United States acting through its agent, the U.S. Army Corps of Engineers owns the land underlying the Fort Gibson Reservoir and it owns and operates the Fort Gibson Dam. The Fort Gibson Reservoir extends from the Fort Gibson Dam on the South to a point on the North side of the reservoir that is less than a mile from the Markham Ferry Dam. (See Exhibit 5 hereto).

The Plaintiffs consist of four Oklahoma rural water districts, a private water company and a private nursery company. The majority of the Plaintiffs appropriate water directly from the Fort Gibson Reservoir or from creeks and steams that feed directly into the Fort Gibson Reservoir. Plaintiff, Peggs Water Company, appropriates water from a well on its own land. However, none of the Plaintiffs appropriate water from any point above where the Grand River becomes the Fort Gibson Reservoir or from creeks or streams that feed directly into the Grand River.

II. PLAINTIFF'S FIRST AMENDED PETITION STATES A CLAIM FOR RELIEF

GRDA contends that Plaintiffs' First Amended Petition fails to state a claim for relief because Plaintiffs can prove no set of facts which entitle Plaintiffs to relief. The basis for GRDA's argument is based on the incorrect assertion that "Plaintiffs' entire lawsuit against GRDA, irrespective of how they style their claims, is premised on a tortured misinterpretation of the 1960 Case..." GRDA is not only incorrect that the Plaintiffs' entire lawsuit is based on the 1960 Case, but it is GRDA that misinterprets the 1960 Case. Plaintiffs are entitled to the relief requested in their First Amended Complaint not only because of the holding of 1960 Case but also because of Oklahoma Law which limits the jurisdictional control of GRDA.

A. NEITHER THE STATE NOR GRDA OWN ANY INTEREST IN THE WATER OF THE GRAND RIVER

While GRDA contends that Plaintiffs' case is based on a "tortured misinterpretation" of the case of *United States v. Grand River Dam Authority,* 363 U.S. 229 (U.S. 1960) (the "1960 Case"), it is GRDA that has misinterpreted the holding in that case. Having aggressively argued to the Supreme Court that GRDA owned a "vested property right" in the waters of the Grand River, GRDA now seeks to downplay the effect of the Supreme Court's ruling arguing that the "Supreme Court did not decide any property rights issues involving the waters of the Grand River." (emphasis added). (GRDA's Motion at p. 4). GRDA conveniently ignores the basis for the holding of the

Court of Claims and its own arguments to the Supreme Court regarding its ownership interest in the water of the Grand River. GRDA also completely misconstrues the Supreme Court's holding.

i. GRDA's Previous Claim To Ownership Of The Water Of The Grand River

After the completion of the Fort Gibson Dam by the United States, GRDA sued the United States in the federal Court of Claims for the taking of its property asserting that it was entitled to compensation for the taking of (1) its water power rights at the Fort Gibson unit, (2) its exclusive franchise to develop electric energy at the Fort Gibson unit, and (3) certain items of severance damages. *Id.* The Court of Claims found the United States had the power to build the Fort Gibson Dam stating:

> The right of a state to control and utilize the water of a non-navigable stream within its boundaries is subordinate to the right of the United States to control such waters to the fullest extent necessary to improve or regulate navigation on a navigable river to which the non-navigable stream is a tributary. There is no question as to the power of the Federal Government to do what it has done here.

Id. at 155-156.

After finding that the United States had the authority to build the Fort Gibson Dam, the Court of Claims focused its attention on whether the United States must pay just compensation to GRDA for any property that it had taken in carrying out the Fort

Gibson project. *Id.* at 156. The Court noted that under the Commerce Clause, the United States had the authority to improve and regulate navigable waters and may take property rights to these waters without compensation. *Id.* However, the Court also noted that if, during the use of this power, private property was taken on a non-navigable stream which is a tributary of the navigable stream, the United States must pay just compensation for the property taken. *Id.* The Court then determined that the exact question before it was whether GRDA had "property rights" in the Grand River which were taken by the United States. *Id.*

The Court of Claims found that GRDA had "vested water rights" in the Grand River and that such rights were property rights that, if taken by the United States, must be paid for.[1] *Id.* at 156. The lynchpin of the Court's decision regarding GRDA's water rights was the finding by the Court that "[t]he State of Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on [GRDA] all the rights which it possessed in the stream." *Id.* at 156.

The United States appealed the decision to the Supreme Court. On appeal, the United States argued that the decision of the Court of Claims as to GRDA's "vested water rights" was in error because GRDA failed to sustain its burden of proving ownership by the State of Oklahoma of all of the water flowing in the

---

[1] The Court of Claims also found that the United States had taken GRDA's franchise to develop electric power and energy at the Fort Gibson Site, but denied GRDA's claim for severance damages. *Id.*

Grand River. (Exhibit 1 hereto, Brief of the United States at p. p. 8, 15-19). Throughout its brief in response, GRDA consistently maintained that it had "vested water rights" in the waters of the Grand River.

> At the time of the taking by [the United States], [GRDA], by legislative grant from the State of Oklahoma, was vested with the absolute right to use and control all of the water power rights in the Grand River, a non-navigable stream. . .

(Exhibit 2 hereto, Brief of GRDA at p. 5).

> The State of Oklahoma had the power and authority to appropriate to and vest in [GRDA] all of the water power rights in the Grand River, together with the exclusive franchise and right to develop the same.

Id.

> **All rights to the waters of the Grand River** had been "**appropriated to and vested in the Grand River Dam Authority**" and others by the State of Oklahoma. . . (emphasis added).

Id.

> The **vested water rights of [GRDA] in the Grand River** are private property and these property rights cannot be taken without payment of just compensation. (Internal citations omitted) (emphasis added).

Id.

> In consequence, **there can be no doubt that [GRDA] had vested water rights in the Grand River** at the time the United States built the Fort Gibson Dam, and that the construction of that Dam took or destroyed the private property of [GRDA], thus entitling it to just compensation. (emphasis added).

Id. at p. 9-10

Not only did GRDA continually argue that it had vested water rights in the Grand River, but it also recognized that in order to prevail in the Supreme Court on appeal, it must prove State ownership of the water in the Grand River. Specifically, GRDA argued:

> [The United States] does not challenge the fact that the State of Oklahoma granted to [GRDA] the use and control of the waters in the Grand River. [The United States] instead appears to contend that the State of Oklahoma did not have an interest in the waters of the Grand River, and accordingly could not give any interest in these waters to [GRDA].
>
> **So certain is [the United States] that [GRDA] cannot show State ownership of the waters used by the Fort Gibson dam, that it has flung down the gauntlet.** "The critical element", [the United States] contends, "is the federal character of the property within the State before it became a state. It is on the basis of that postulate that the [GRDA] must somehow show a grant from the Federal Government"

Respondent accepts this challenge.

Id. at p. 7-8 (emphasis added).

GRDA then set about to prove its chain of title to the waters of the Grand River to the Supreme Court. GRDA attempted to prove State ownership of the water by tracing title from the United States to the State of Oklahoma through a grant to the Cherokee Nation and through an Act of Congress which granted to power and light companies the rights-of-way to build dams in the Indian Territory across non-navigable streams for the purpose of generating power. (Exhibit 2 at p. 8-9). Thus, despite GRDA's arguments in the present case, the central focus of the 1960 Case was whether GRDA had any "vested property rights" in the waters of the Grand River.

ii. The Ruling Of The 1960 Case

Despite having vehemently argued to the Supreme Court that it had a vested property right in the waters of the Grand River that had been appropriated by the United States, GRDA now argues that "the Supreme Court did not decide any property rights issues involving the Grand River." As support for this contention, GRDA cites to the following passage from the Supreme Court's decision in the 1960 Case:

> The Government contends that the navigational servitude of the United States extend to non-navigable waters [of the Grand River], pre-empting state-created property rights in such waters, at least when asserted against the Government. In the view we take in this case,

> however, it is not necessary that we reach this contention. (GRDA Motion at p. 7)

GRDA completely misconstrues the meaning of the above-quoted portion of the Supreme Court's decision.

As stated above, the Court of Claims had noted that if, during the use of the commerce power to regulate navigable streams, private property was taken on a non-navigable stream which is a tributary of the navigable stream, the United States must pay just compensation for the property taken. *GRDA,* 175 F.Supp. at 156. The United States argued to the Supreme Court that the rules applicable to navigable streams (i.e. the United States does not have to compensate for the taking of property rights on a navigable stream) also applied where the United States utilized the commerce power to regulate a tributary (here, the Grand River) to a navigable stream (the Arkansas River). (Exhibit 1 at p. 9-13).

Contrary to GRDA's argument, the above-quoted statement from the 1960 Case did nothing more than indicate that it was not necessary for the Supreme Court to address the United States' contention that the law applicable to takings along a navigable stream (i.e. that no compensation is due for the taking of private property) also applied to a non-navigable stream where the United States exercised its commerce power to regulate the flow of a tributary to a navigable stream. As explained by the Supreme Court later in its opinion, it was unnecessary to address this contention because GRDA had failed to meet its initial burden of proving that any private property had been taken from GRDA.

The Supreme Court agreed with the Court of Claims that the United States had the power and authority to build the Fort Gibson Dam under the commerce power. *United States v. Grand River Dam Authority*, 363 U.S. 229, 232-233 (U.S. 1960). The Court then addressed GRDA's contention that it had a vested interest in the waters of the Grand River pursuant to the grant made by Oklahoma to GRDA. *Id.* at 233. The Court noted that GRDA attempted to trace the title of Oklahoma through a grant from the United States to the Cherokee Nation. *Id.* at 233-234. The Court concluded, however, that if the Cherokee Nation had obtained rights to the water from the United States, none of these rights thereafter passed to the State of Oklahoma. *Id.* at 234. The Court also addressed GRDA's contention that the State received rights to the waters of the Grand River through an Act of Congress which gave light and power companies the right to construct dams across non-navigable streams in the Cherokee territory. *Id.* The Court specifically concluded that "no water rights condemned under this Act are shown to have passed to Oklahoma and from Oklahoma to [GRDA]." *Id.* at 235.

Despite all of its arguments to State ownership of the waters of the Grand River, the Supreme Court concluded that "[GRDA] has done no more than prove that a prospective opportunity was lost. More than that is necessary..." *Id.* at 236. In other words, GRDA had only proven that it had lost a prospective business opportunity but failed to prove that the State had <u>any</u> property interest or ownership interest in the waters of the Grand River. Having failed to prove that the State possessed a property interest in the water of the Grand River (and that GRDA therefore lacked any interest as the State's agent), the Court ultimately

concluded "the United States did not appropriate any business, contract, land, or property of [GRDA]." *Id.* at 236.

The Supreme Court could not make its holding more clear. The effect of its decision was that neither GRDA nor the State of Oklahoma possessed any property interest in the waters of the Grand River. Obviously, if the State of Oklahoma did not possess any property interest in the water of the Grand River, it could not by a boot-strap process of declaring a "legislative appropriation" create greater rights to the Grand River in its agent than the State itself possessed. Any purported property rights that the State attempted to convey to GRDA were nullified by the pronouncement in the 1960 Case. As a result, Plaintiffs have shown their entitlement to the relief requested in their First Amended Complaint and GRDA's Motion to Dismiss should be denied.

B. OKLAHOMA LAW DOES NOT ALLOW GRDA TO CHARGE PLAINTIFFS FOR THE WATER THAT THEY APPROPRIATE

GRDA argues that Oklahoma Law does not support any claim for relief in Plaintiffs' First Amended Petition and that Oklahoma Law establishes Oklahoma's ownership of and GRDA's right to sell Plaintiffs the water in question. To the contrary, Oklahoma Law expressly limits the State's ownership of water to and GRDA's right to sell water from the Grand River and reservoirs along the Grand River that lie upstream from the Fort Gibson Reservoir.

As support for its contention that the State of Oklahoma owns all of the water in the Grand River, GRDA cites to 82 O.S. § 887 which provides:

> That the waters of Grand River in Oklahoma and the Pensacola and Markham Ferry Reservoirs, located thereon, be and are hereby determined and declared to be non-navigable and waters of the State of Oklahoma.

To the extent that this statute is not in conflict with the 1960 Case, it specifically defines which water along the Grand River belongs to the State of Oklahoma. GRDA essentially asserts that all water along the Grand River belongs to the State and therefore, GRDA can sell any water flowing in the Grand River. However, GRDA's interpretation of Section 887 is a stretch.

While GRDA attempts to focus the Court's attention on the "waters of Grand River" language, it conveniently ignores the language regarding the Pensacola and Markham Ferry Reservoirs. The reason GRDA ignores this language is because it reflects a clear intent by the Legislature that the water within the Fort Gibson Reservoir is not "owned" by the State of Oklahoma and is not subject to the control of GRDA.

Section 887 (which is part of the statutes controlling GRDA) was enacted by the Oklahoma Legislature in 1963. By the time of its enactment, the Fort Gibson Reservoir had existed for thirteen years and the 1960 Case had been decided three years earlier. Had the Legislature believed that the water in the Fort Gibson Reservoir was owned by the State of

Oklahoma, the language of the statute would be quite different.

The separate identification of the Grand River and the Pensacola and Markham Ferry Reservoirs indicates that the Legislature considered there to be a distinction between water flowing within the riverbed of the Grand River and water impounded at a reservoir along the Grand River. Had the Legislature intended all water along the Grand River (including water impounded in reservoirs) to be included within its definition of "waters of the State," there would be no need to separately identify the Pensacola and Markham Ferry Reservoirs. The Legislature could have simply listed the waters of Grand River and left out the Pensacola and Markham Ferry Reservoirs. The inclusion of both the waters of Grand River along with these two reservoirs shows that the Legislature was drawing a distinction between water flowing in the Grand River riverbed from water impounded at a reservoir.

The Legislative intent to exclude the Fort Gibson Reservoir from its determination of "waters of the State" is also evident from the fact that the Legislature specifically excluded the Fort Gibson Reservoir from the list of reservoirs along the Grand River that were considered "waters of the State." Obviously, the Legislature knew of the existence of the Fort Gibson Reservoir at the time of the enactment of Section 887, and could have listed it in the statute. The fact that the Legislature omitted the Fort Gibson Reservoir from the statute shows that this water is not owned by the State. Since this water is not owned by the State, GRDA has no legal right to sell it. Clearly, by omitting the Fort Gibson Reservoir, the Legislature intended to

limit the jurisdictional control of GRDA to only that water flowing in the Grand River riverbed and the reservoirs along the Grand River owned and operated by GRDA.

In 1975, the Oklahoma Legislature further clarified the jurisdictional limitation of GRDA to the waters upstream from the Fort Gibson Reservoir when it enacted 82 O.S. § 890 as a part of the statutes governing GRDA. Section 890 provides:

> The Grand River Dam Authority **shall have no control** over that portion of the Grand River downstream from Fort Gibson Dam to the point of confluence of the waters of the Grand River with those of the Arkansas River.

By excluding the water flowing from the Fort Gibson Reservoir from the jurisdictional control of GRDA and by not including the Fort Gibson Reservoir in its determination of what the Legislature deemed "waters of the State," the Legislature limited GRDA's authority to sell water to only the portion of the Grand River and the reservoirs that lie upstream from the Fort Gibson Reservoir. As such, GRDA's Motion to Dismiss should be denied.

C. GRDA HAS NO RIGHT TO CHARGE PLAINTIFFS FOR WATER APPROPRIATED BY PLAINTIFFS BECAUSE THE WATER APPROPRIATED IS NOT CONTROLLED, STORED OR PRESERVED BY GRDA

Pursuant to 82 O.S. § 862, GRDA was granted the right "[t]o control, store and preserve, within the

boundaries of the District, the water of the Grand River and its tributaries for any useful purpose, **and** to use, distribute and **sell the same** within the boundaries of the District. . ." (emphasis added). To the extent that GRDA has any right to sell the water of the Grand River (which Plaintiffs deny in light of the 1960 Case), that right extends only to water that GRDA "controls, stores or preserves." GRDA does not control, store or preserve the water appropriated by the Plaintiffs and has no authority to charge Plaintiffs for the use of this water.

As stated above, GRDA owns and controls the Pensacola Dam and the Markham Ferry Dam along the Grand River. GRDA releases water from the Pensacola Dam and that water flows into the Markham Ferry Reservoir. GRDA then releases the water from the Markham Ferry Dam and that water flows into the Fort Gibson Reservoir which is owned and controlled by 11 the United States acting through the U.S. Army Corps of Engineers. Water is released from the Fort Gibson Dam back into the Grand River and it flows into the Arkansas River. The water leaves the State of Oklahoma and eventually flows into the Gulf of Mexico.

The majority of the Plaintiffs appropriate (for beneficial uses) water from the Fort Gibson Reservoir or from creeks and streams that feed **directly** into the Fort Gibson Reservoir and not into the Grand River. Plaintiff, Peggs, appropriates water from a water well on its own land. GRDA takes no action to control, store or preserve any of the water in Peggs' water well, any of the water impounded by the Fort Gibson Dam or any of the water from creeks or streams that feed directly into the Fort Gibson Reservoir. Any efforts to

control, store and preserve any water below the Markham Ferry Dam are undertaken by the United States through its agent, the Corps of Engineers. Because GRDA does not control, store and preserve the water that Plaintiffs appropriate, it has no right to charge Plaintiffs for the use of this water.

The fact that GRDA does not own the Fort Gibson Dam is also significant under the Oklahoma Water Code. Section 105.21 of the Oklahoma Water Code provides:

> The owner of any works for the storage, diversion or carriage of water, which contain water in excess of his needs for irrigation or other beneficial use for which it has been appropriated, shall be required to deliver such surplus, at reasonable rates for storage or carriage, or both, as the case may be, to the parties entitled to the use of the water for beneficial purposes.

82 O.S. § 105.21

By building the Fort Gibson Dam, the United States undertook the control, storage and preservation of the waters of the Grand River below the Markham Ferry Dam and appropriated these waters for the generation of electricity and flood control. Pursuant to this statute, only the owner of the Fort Gibson Dam may charge appropriators for their use of the water impounded by the Dam. Since GRDA does not own the Fort Gibson Dam, it cannot charge for the water appropriated by the Plaintiffs.

III. PLAINTIFFS ARE ENTITLED TO A DECLARATORY JUDGMENT

GRDA challenges Plaintiffs' right to seek declaratory relief based on its own self-serving interpretation of the 1960 Case. As shown above, not only does the 1960 Case support Plaintiffs' claim for declaratory judgment as to the water in the Grand River, but Oklahoma statutory law supports Plaintiffs' claim for declaratory judgment as to the waters impounded at the Fort Gibson Reservoir and the creeks and streams that feed directly into the Fort Gibson Reservoir.

As an additional basis for dismissing Plaintiffs' declaratory judgment claim, GRDA asserts that there simply is no actual controversy between Plaintiffs and GRDA sufficient to invoke the Court's jurisdiction to grant declaratory judgment. GRDA's argument is grounded on the fallacious premise that Plaintiffs must claim an ownership interest in the waters of the Grand River for there to be a justiciable controversy. However, no such interest is necessary.

The Oklahoma Declaratory Judgment Act, 12 O.S. § 1651 provides in relevant part:

> District courts may, in cases of actual controversy, determine rights, status, or other legal relations. . . The determination may be made either before or after there has been a breach of any legal duty or obligation, and it may be either affirmative or negative in form and effect; provided however, that a court may refuse to make a determination where the judgment, if rendered, would not terminate the

controversy, or some part thereof, giving rise to the proceeding.

"The Declaratory Judgments Act must be liberally construed to obtain its objective to expedite and simplify the ascertainment of uncertain rights." *State ex rel. Bd. of Examiners in Optometry v. Lawton, Okla.*, 523 P.2d 1064 (1974). The nature and purpose of declaratory judgment is to declare rights. *Hyman-Michaels Co. v. Hampton, Okla.*, 471 P.2d 463 (1970).

GRDA requires anyone that appropriates water for beneficial uses from the Fort Gibson Reservoir, from streams or creeks that feed directly into the Fort Gibson Reservoir or from water wells near the Fort Gibson Reservoir to pay GRDA for the water that they appropriate from these water sources. (Exhibit 3 hereto, GRDA website). Each of the Plaintiffs has a contract and/or permit with GRDA which provides for the payment to GRDA for the water that they appropriate. Each contract/permit also provides that if Plaintiffs fail to make payments, GRDA can terminate their service. (Exhibit 4 hereto). Plaintiffs contend that GRDA has no legal right to charge them for the water that they appropriate. This determination is exactly the type of "controversy" the Declaratory Judgment Act was intended to address. It is a determination of legal rights and status and such determination will impact whether Plaintiffs may discontinue payments to GRDA for water that they appropriate without fear of being in breach of some legal duty or obligation to GRDA.

GRDA also asserts that Plaintiffs lack standing to seek a declaration because Plaintiffs are asserting the rights of the United States. Again, GRDA's argument

is based on the fallacious premise that Plaintiffs must assert the rights of whoever owns the water in question. Standing in a declaratory judgment action must be predicated on an interest that is direct, immediate and substantial. *Democratic Party of Oklahoma v. Estep, Okla.,* 652 P.2d 271 (1982). Plaintiffs are not required to prove who owns the water in question for the Court to declare that GRDA does not own the water or that GRDA has no legal right to sell the water to the Plaintiffs. Plaintiffs have the right under Oklahoma Law to use the water in the Fort Gibson Reservoir, from the streams and creeks that feed directly into the Fort Gibson Reservoir and from water wells on their own land that are near the Fort Gibson Reservoir. By statute, Plaintiffs have the right to demand that the United States provide them with any surplus water in the Fort Gibson Reservoir to use for beneficial purposes. Thus, Plaintiffs' right to use the water is clear. Since Plaintiffs have a direct, immediate and substantial interest in using the water in question, they likewise have standing to determine whether GRDA has any right to charge them for the use of this water.

IV. INJUNCTIVE RELIEF AGAINST GRDA IS PROPER

Based on the pronouncement in the 1960 Case that neither GRDA nor the State of Oklahoma has any vested property rights in the waters of the Grand River, Oklahoma Law that limits the control of GRDA to the water in the Grand River and reservoirs that lie above the Fort Gibson Reservoir and because GRDA does not control, store or preserve the water in question, Plaintiffs have a substantial likelihood of success on the merits of their case. Plaintiffs also will

suffer irreparable injury, the equities are balanced in their favor, and there would be no injury to the public interest.

A. LIKELIHOOD OF SUCCESS ON THE MERITS

GRDA contends that Plaintiffs are not entitled to injunctive relief because the 1960 Case does not support Plaintiffs and because Oklahoma Law is contrary to Plaintiffs' position. As shown above, GRDA has misconstrued the holding in the 1960 Case. There is no question that the Supreme Court found that neither GRDA nor the State of Oklahoma possessed any property interest in the waters of the Grand River. Since Oklahoma does not possess a property interest in these waters, it could not by legislative enactment grant to GRDA rights that the State did not itself possess. Additionally, the Oklahoma Legislature has specifically restricted GRDA's control over the Grand River by distinguishing between water flowing in the riverbed and water stored at reservoirs, by omitting the Fort Gibson Reservoir from what is deemed "waters of the State" and by precluding GRDA from controlling any of the water flowing out of the Fort Gibson Reservoir.

GRDA also asserts that it cannot be enjoined where it is performing the duties imposed by valid statutes. This argument fails for two reasons. First, the State cannot grant to GRDA any power which itself does not possess, so any grant of authority to sell the water of the Grand River is invalid. Second, GRDA is selling water that is beyond GRDA's statutory grant of authority to sell in light of the statutes that control GRDA.

i. The State Of Oklahoma Cannot Grant To Its Agency Power Which It Does Not Itself Possess

It is a fundamental principal of agency law that a principal may only do through an agent those things that he may lawfully do personally. *Restatement (Second) of Agency § 17*. A principal may not delegate to his agent or nominee authority which he himself does not possess. *Restatement (Second) of Agency § 20*. "In other words, an 'individual may not create an agent who has greater power than the individual himself possesses.' " *U.S. v. Craig*, 896 F.Supp. 85, 89 (N.D.N.Y.,1995). This rule applies not only in the typical principal-agent context but applies equally to an agency of the government. See *U.S. v. Johns*, 336 F.Supp.2d 411, 420 at n. 9 (M.D.Pa.,2004) ("Although this authority was delegated to an agency, the United States Sentencing Commission, the agent can exercise no greater constitutional power than the principal."); See also, *Grand River Dam Authority v. U.S.*, 175 F.Supp. 153, 158 (CT.CL. 1959) (Judge Whitaker notes in his dissenting opinion that "[GRDA], the state's agent, of course has no greater right than its creator, the State of Oklahoma.")

As noted by GRDA in its Motion, GRDA is a non-incorporated *agency* of the State of Oklahoma created in 1935 pursuant to the Grand River Dam Authority Act, 82 O.S. § 861, *et seq*. GRDA is an agent of the State of Oklahoma created by the State by an Act of the Legislature. GRDA's power and authority is derived from its principal, the State of Oklahoma. The State cannot by legislative action empower its agent, GRDA, with any more or greater authority than the State itself possesses. Because the State of Oklahoma

does not own the waters of the Grand River, it cannot empower GRDA to sell something that it does not own.

ii. GRDA Is Acting Outside Of The Authority Granted To It

As shown above, the Oklahoma Legislature clearly defined what water along the Grand River was deemed "waters of the State of Oklahoma." That definition did not include the water impounded at the Fort Gibson Reservoir. Despite this statute, GRDA has continued to sell water from the Fort Gibson Reservoir. These actions are outside of GRDA's statutory authority and injunctive relief is proper. Thus, Plaintiffs have demonstrated a substantial likelihood of success on the merits.

B. PLAINTIFFS ARE BEING IRREPARABLY HARMED AND THE BALANCE OF THE EQUITIES ARE IN THEIR FAVOR

GRDA argues that Plaintiffs have not been irreparably harmed because Plaintiffs have voluntarily purchased water from GRDA for forty-eight years despite the existence of the 1960 Case. GRDA's contention is wrong for two reasons. First, Plaintiffs were unaware of the 1960 Case until shortly before filing their initial action against GRDA in the Northern District of Oklahoma in November of 2007.[2]

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[2] In a footnote to GRDA's Motion, GRDA claims that this is Plaintiff's "second bite at the apple." This is a baseless argument. GRDA was dismissed from the federal suit on 14th Amendment immunity grounds. No decision on the merits of Plaintiffs' claims was reached in the federal suit. The Court simply found that

Second, Plaintiffs had no choice but to purchase water from GRDA because GRDA controls the permitting process for the taking of any water from the Grand River. (Exhibit 3 hereto, GRDA website). GRDA controls who is allowed to remove water from the Grand River and its tributaries and forces certain large water appropriators (such as Plaintiffs) to pay GRDA for the water that they appropriate. Thus, any assertion that Plaintiffs "voluntarily" paid for water is utterly false.

GRDA also argues that Plaintiffs could at any time cease making payments and pursue damages against GRDA for breach of contract and that money damages would be adequate. For purposes of proving irreparable harm, Oklahoma Courts have determined that "[i]njury is irreparable when it is incapable of being fully compensated for in damages or where the measure of damages is so speculative that it would be difficult if not impossible to correctly arrive at the amount of the damages." *Hines v. Independent School Dist. No. 50, Grant County,* 1963 OK 85, 380 P.2d 943.

Here, the irreparable harm is clear. GRDA is selling water which it does not own and has no right to sell. GRDA controls the appropriation of water from the Grand River and its tributaries. The contracts/permits between Plaintiffs and GRDA provide that if Plaintiffs fail to make payments, GRDA can terminate their service. (Exhibit 4 hereto). In other words, if Plaintiffs stopped paying for water that they appropriate from the Grand River, GRDA would

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Plaintiffs' claims against GRDA could not be asserted in federal court.

terminate Plaintiff's access to this water. The majority of Plaintiffs are water districts which supply water to residences and businesses within rural areas. Plaintiff, Tri-B Nursery, Inc. is a private business that relies heavily on water from the Grand River for the operation of its business. If Plaintiffs ceased paying GRDA for water and GRDA terminated service, Plaintiffs would have no other readily available source of water to serve their customers or to operate their business resulting in damages to Plaintiffs that would be difficult if not impossible to calculate.

GRDA has adopted the position that it will continue to sell water that it does not own despite the Supreme Court's ruling in the 1960 Case and despite clear statutory law that shows that GRDA has no right to sell the water in question. Plaintiffs should not have to pay GRDA for water that it does not own and has no right to sell; however, until this Court enjoins GRDA from forcing the sale of water, Plaintiffs have no choice but to continue to pay GRDA for water or risk the termination of their service. Thus, Plaintiffs' dispute cannot be easily remedied with money damages. An injunction against GRDA is the only way to insure Plaintiffs' continued water service.

C. THE PUBLIC INTEREST WOULD NOT BE HARMED BY THE ISSUANCE OF AN INJUNCTION

GRDA also argues that the issuance of an injunction against GRDA would harm the public interest because GRDA's contracts with its other water customers might be jeopardized. GRDA argues that these other challenges could span years and could unduly jeopardize GRDA' s financial condition as well

as its legislative mandate to control, store, preserve. . . and sell" the waters of the Grand River. GRDA offers no argument as to how Plaintiff's attack on GRDA's legislative mandate will somehow harm the public interest with regard to GRDA's right to sell water from the Grand River. Obviously, the public interest is best served when a State agency is not allowed to sell property that it does not own.

As to the effect on its inancial condition, GRDA's water sales account for less than a percent of its hundreds of millions of dollars of revenue. Why GRDA would sacrifice its ability to continue as a going concern to litigate other challenges to GRDA's right to sell water from the Grand River in light of the decision in the 1960 Case and in light of controlling Oklahoma Law is a mystery; however, if GRDA makes this decision, it does not impact any public interest because it is a decision that GRDA has voluntarily made. The public interest in allowing the citizens of the State to put the waters of the State to beneficial uses greatly outweighs the miniscule effect that the loss of water sales would have on GRDA's bottom line. As a result, an injunction against GRDA is proper.

V. THE STATUTE OF LIMITATIONS IS NOT A BAR TO RECOVERY FOR UNJUST ENRICHMENT

GRDA argues that Plaintiffs' claim for unjust enrichment should be dismissed because the statute of limitations bars recovery under that claim. GRDA contends that Plaintiffs had to bring their claim for unjust enrichment within three years of the decision in the 1960 Case and since they did not, Plaintiffs are barred from seeking unjust enrichment for all

payments made over the past 48 years to GRDA. As support for this contention, GRDA cites to *Lapkin v. Garland Bloodworth, Inc.*, 23 P.3d 9581 (Okla. Civ. App. 2000).

The *Lapkin* case is clearly distinguishable from the facts of the present case. In *Lapkin,* a settlement agreement was reached in a medical malpractice case, and an insurance company made a single payment to settle the case. *Id.* at 961. The settlement monies were paid to the Plaintiff and to the attorneys that had handled the case on a contingency basis. *Id.* The Oklahoma Supreme Court declared the settlement agreement void and the Plaintiff sought to rescind the settlement in another proceeding. Plaintiff repaid the amounts received from the settlement but the attorneys refused to return the monies that they received from the settlement. *Id.* The doctor on whose behalf the settlement proceeds had been paid sued the attorneys for unjust enrichment to recover the sums paid to the attorneys under the void settlement. *Id.* The attorneys asserted the statute of limitations barred recovery; however, the Court found that the claim for unjust enrichment did not begin to accrue until the Supreme Court had declared the settlement void. *Id.* at 962.

Here, GRDA apparently argues that any cause of action the Plaintiffs had against GRDA for unjust enrichment accrued as soon as the 1960 Case was decided, and that Plaintiffs waited more than forty-eight years to assert their claims. The fallacy in this argument is that none of the Plaintiffs were parties to the 1960 Case. Another distinguishing fact is that in *Lapkin,* a single payment was made at a time when the settlement agreement was valid. Here, Plaintiffs

made payments before learning that GRDA lacked the authority to sell the water in the Grand River. Plaintiffs also continue to make payments (under protest) for fear of having their water service terminated. Furthermore, each successive payment to GRDA for water that it does not own gives rise to a new claim for unjust enrichment. Thus, Plaintiffs' unjust enrichment claim is not barred by the statute of limitations.

VI. PLAINTIFFS HAVE NOT FAILED TO JOIN AN INDISPENSABLE PARTY

GRDA also contends that if it does not own the water of the Grand River, all parties that could own an interest in the water should be made parties to this litigation. Although GRDA contends that all parties claiming an interest in the waters of the Grand River should be made parties to this lawsuit, no other parties need be present. No other parties are necessary for this Court to determine that GRDA does not own the water in the Fort Gibson Reservoir, the water in the streams and creeks that feed directly into the Fort Gibson Reservoir or from water wells on land near the Fort Gibson Reservoir. Assuming the Court determined that GRDA had no ownership interest in this water and/or no right to sell this water, that determination would only affect GRDA and not any other party claiming an interest. Likewise, such determination would have no impact on the rights of any third parties to assert their own interest at a later date since GRDA's interest would be the only interest determined.

In a footnote, GRDA cites to *Ellis v. Union Oil Co. of California,* 630 P.2d 306 (Okla. 1981) to support its

contention that indispensable parties have not been joined. *Ellis* does not advance GRDA's argument. In *Ellis,* a riparian landowner sought to quiet title to mineral interests along the Red River. The riparian owner owned land and mineral interests along the southern bank of the Red River and claimed that through the process of accretion the course of the Red River had moved North extending his land and mineral interests northward. *Id.* at 307-308. The United States owned the mineral interests of three lots immediately north and contiguous to Ellis' land and Ellis sought to quiet title to the mineral interests of appellant's land which was North of and contiguous to the lots to of the United States. *Id.* at 309-310. The Court found that mineral inte. ests were subject to loss or gain by the process of accretion. *Id.* at 309. However, the Court found that Ellis had no justiciable claim to the appellant's mineral interests until he established that he had acquired the interest of the United States. *Id.* at 310. Because Ellis could not invoke the doctrine of accretion against the appellant's mineral interests without affecting or clouding the interests of the United States, the United States was found to be an indispensable party. *Id.* at 310.

Here, Plaintiffs are not seeking to quiet title to non-contiguous tracts of land or mineral interests. Instead, Plaintiffs ask the Court (1) to find (in conformance with the 1960 Case and Oklahoma Law) that GRDA has no property interest in and/or no right to sell the water in the Fort Gibson Reservoir, the water in any streams or creeks that flow directly into the Fort Gibson Reservoir or the water in any wells near the Fort Gibson Reservoir, (2) to enjoin GRDA from charging for the use of this water and (3) for GRDA to repay Plaintiffs for charges for water that GRDA had

no right to sell. Unlike the *Ellis* case, Plaintiffs do not seek to acquire any interest that GRDA may have in the water in question, but ask the Court to uphold the Supreme Court's determination that GRDA has no interest and to uphold Oklahoma statutes which restrict GRDA's right to sell only the water in the Grand River and reservoirs along the Grand River that lie above the Fort Gibson Reservoir.

The effect of this suit would not, as GRDA suggests, subject GRDA to multiple suits. Once this Court enters a declaratory judgment, GRDA's rights would be determined and there would be no need for another Court to later re-litigate GRDA's rights because this determination would be binding and conclusive as to GRDA's rights.

Assuming some other party stepped forward later to assert rights to these waters, there would be no impact on GRDA because its rights have already been determined. There are no indispensable parties that need to be joined for GRDA's rights to be determined because such a determination would not impact the rights of any other parties that may claim an interest in the water at issue.

WHEREFORE, above premises considered, Plaintiffs respectfully request that the Court deny GRDA's Motion to Dismiss.

Respectfully submitted,
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